

SC84131

IN THE SUPREME COURT OF MISSOURI

DENNIS EDWARD WOODSON

Appellant

v.

BELINDA ULRICH-WOODSON

Respondent/Cross-Appellant

APPEAL FROM THE CIRCUIT COURT
PLATTE COUNTY, MISSOURI
DIVISION FIVE
HONORABLE GARY D. WITT, JUDGE

CIRCUIT CASE NO. 00CV83932

RESPONDENT/CROSS-APPELLANT'S BRIEF ON APPEAL

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JURISDICTIONAL STATEMENT

This action is one involving the equitable division of marital property upon a decree of dissolution. Appellant appeals the division of funds under R.S.Mo. Section 169.572, following a Decree of Dissolution of Marriage. This is a cross-appeal from a court-tried case to the Supreme Court of Missouri in response to the Notice of Appeal previously filed to this Court by Respondent. Respondent's Notice of Appeal questions the validity of R.S.Mo. Section 169.572 under the Equal Protection and Due Process

Clauses of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Sections Two and Ten of the Missouri Constitution. Jurisdiction is proper in this court under Article V, Section Three of the Missouri Constitution which grants the Missouri Supreme Court exclusive jurisdiction in all cases involving the validity of a statute or provision of the Constitution of this state.

STATEMENT OF FACTS

This cross-appeal is to a judgment rendered on August 9, 2001 in the circuit court of Platte County, Division Five. Respondent and Cross-appellant, Belinda Ulrich Woodson married Appellant Dennis Edward Woodson on March 22, 1971. This marriage was later dissolved in October of 1973.(Transcript 15, Lines 15-25). The parties were remarried to each other in December of 1974.(T.16, L.1-5). There were six children born of this marriage between 1976 and 1989.(T.18, L.20-24).

In 1985 Belinda Ulrich Woodson began what would become an exemplary career in teaching working for the Kansas City, Missouri School District at Southeast Junior High School. Her rapid progression as an educator and administrator would coincide with her familial duties of bearing and raising her six children while often providing the sole source of income when Dennis Woodson was unemployed.(T.42, L.5-25); (T.45, L.19-24); (T.46, L.3-19). Following her employment at Southeast Junior High, she then moved to Lincoln Middle School where she was promoted to Curriculum Coordinator in 1990.(T.41, L.12-15). She began her Education Specialist Degree program in 1992 and was made Vice Principal of Southwest High School. In 1994, she accepted a position as Principal at Gingham Middle School which she maintained for four years. She then became Principal of Nowlin Middle School in Independence, Missouri, also affiliated with the Kansas City, Missouri School District, and is currently in her fifth year there directly supervising over one hundred employees.(T.37, L.6-16).

The second marriage of 1975 between Belinda Ulrich and Dennis Edward Woodson began to deteriorate around the time their last child was born in 1989. (T.24, L.

7-10). This deterioration produced an emotionally painful series of occasions for Belinda during which Dennis became verbally abusive to her and the children in the form of profane and threatening tirades.(T.25, L.6-25). The progressive nature of these incidents culminated in the physical assault of Belinda by Dennis in the presence of their children, threats of inflicting serious bodily injury and even death upon her thus requiring the filing of an Ex Parte Order of Protection by Belinda against Dennis and their separation in June, 2001.(T.18, L.3-19); (T.30-32).

On August 9, 2000, Belinda filed her Petition for Dissolution of Marriage.(Legal File, P.102). The court heard arguments on Belinda's (Petitioner's) request for custody of her children and on the classification of property as well as arguments on Dennis' (Respondent's) motion to classify Petitioner's retirement fund as marital property. The judge determined it to be in the best interests of the minor children to reside with Belinda Woodson and designated her primary residential custodian.(LF, P.103).

In determining an equitable distribution of property, the court held that Petitioner's retirement plan through the public-school system was her non-marital property and therefore non-divisible between the parties.(LF, P.109). The court relied on §169.572, R.S.Mo. and the controlling decision of *Silcox v. Silcox*, 6 S.W. 3rd, 899 (Mo. Banc 1999) in setting the retirement plan aside to Petitioner.(LF, P.109). At the time of dissolution, the retirement was valued at \$193,693.00 and held to be a factor in determining the division of the remaining marital property.(LF, P.110). The court heard evidence detailing misconduct by Respondent in reporting misleading and incorrect income from lawn care and snow plowing work he had done (T.170-171), (LF, P.109)

and in admitting to making dishonest reports of "cash on hand" in his statement of Marital and Nonmarital Property.(T.175, L.7-13). Indeed, Respondent reported having "twenty dollars" as cash on hand while deliberately concealing over fifteen thousand dollars in cash from discovery.(T.175, L.7-25).

The trial court divided the marital property and awarded to Respondent Dennis Woodson marital assets totaling \$359,274.00.(LF, P.115-16). The court awarded to Petitioner Belinda Woodson assets totaling \$163,274.00.(LF, P.114-15). Although the Judgment reflects an order for Petitioner to pay all of the marital debt which totaled \$140,392.00, those entries are scrivener's errors and it was actually Respondent who was ordered to pay same.(LF, P.117). After subtracting the marital debt from Respondent's award, he received net assets totaling \$218,882.00 against Petitioner's net marital property distribution of \$163,274.00. Petitioner was not cross-examined by Respondent at trial and the court heard no testimony nor received any evidence of misconduct by Petitioner. The misconduct of Respondent discussed above was well verified by the evidence before the court which including his own testimony. Nevertheless, the court erroneously divided the marital assets in a roughly sixty percent to forty percent distribution in favor of Respondent.

On December 13, 2001, Appellant Dennis E. Woodson filed his notice of appeal to the Missouri Supreme Court challenging the constitutionality of §169.572, R.S.Mo. (LF, P.131). On December 19, 2001, Respondent and Cross-Appellant Belinda Ulrich Woodson filed her cross-appeal challenging the inequitable distribution of property as

being unsupported by substantial evidence and against the weight of the evidence presented.

POINTS AND AUTHORITIES RELIED ON

- I. THE TRIAL COURT ERRED IN THE DISTRIBUTION OF THE MARITAL PROPERTY UPON DISSOLUTION BECAUSE THE DIVISION WAS SO HEAVILY AND UNDULY IN FAVOR OF APPELLANT AND AGAINST THE WEIGHT OF THE EVIDENCE TO AMOUNT TO AN ABUSE OF DISCRETION IN THAT THE CONSIDERATION OF RESPONDENT/CROSS-APPELLANT'S RETIREMENT FUND MATERIALLY IMPACTED THE DIVISION OF PROPERTY WHEN SHE WAS AWARDED ONLY FORTY PERCENT OF MARITAL ASSETS EVEN THOUGH THE TRIAL COURT HEARD SUBSTANTIAL EVIDENCE OF APPELLANT'S MISCONDUCT DURING THE MARRIAGE AND THE DISHONEST AND MISLEADING REPORTING OF HIS INCOME AND ASSETS AND THERE WAS NO SUCH MISCONDUCT COMMITTED BY RESPONDENT/CROSS-APPELLANT TO JUSTIFY THE UNEVEN AND**

**INEQUITABLE DIVISION OF PROPERTY IN
APPELLANT'S FAVOR.**

Dardick v. Dardick, 670 S.W. 865 (Mo. Banc 1984)

DeMayo v. DeMayo, 9 S.W. 3d 736 (Mo.App. 2000)

In re Marriage of Medlock, 990 S.W. 2d 186 (Mo.App.S.D. 1999)

Silcox v. Silcox, 6 S.W.3d 899 (Mo. banc 1999)

§452.330.1 R.S.Mo.

§169.572 R.S.Mo.

ARGUMENT AND AUTHORITY

- I. THE TRIAL COURT ERRED IN THE DISTRIBUTION OF THE MARITAL PROPERTY UPON DISSOLUTION BECAUSE THE DIVISION WAS SO HEAVILY AND UNDULY IN FAVOR OF APPELLANT AND AGAINST THE WEIGHT OF THE EVIDENCE TO AMOUNT TO AN ABUSE OF DISCRETION IN THAT THE CONSIDERATION OF RESPONDENT/CROSS-APPELLANT'S RETIREMENT FUND MATERIALLY IMPACTED THE DIVISION OF PROPERTY WHEN SHE WAS AWARDED ONLY FORTY PERCENT OF MARITAL ASSETS EVEN THOUGH THE TRIAL COURT HEARD SUBSTANTIAL EVIDENCE OF**

**APPELLANT'S MISCONDUCT DURING THE
MARRIAGE AND THE DISHONEST AND
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COMMITTED BY RESPONDENT/CROSS-
APPELLANT TO JUSTIFY THE UNEVEN AND
INEQUITABLE DIVISION OF PROPERTY IN
APPELLANT'S FAVOR.**

Respondent/Cross-Appellant challenges the trial court's uneven division of marital property without sufficient evidentiary justification. The trial court decision in a dissolution proceeding will be upheld unless there is no substantial evidence to support it, it is against the weight of the evidence or it erroneously declares or applies the law.

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). Property distribution is left to the discretion of the trial court and an appellate court will only interfere with the trial court's division of property if it is so unduly weighted in favor of one party that it constitutes an abuse of discretion. Dardick v. Dardick, 670 S.W. 865 (Mo. banc 1984). While a trial court's division of marital property need not be equal, it must be fair and equitable and take into account the factors enumerated by statute. In re Marriage of Medlock, 990 S.W. 2d 186 (Mo.App.S.D. 1999).

The relevant factors for the trial court's determination are enumerated in §452.330.1 R.S.Mo. which provides, in pertinent part:

- 1. In a proceeding for dissolution of the marriage or legal separation... the court shall set apart to each spouse such spouse's nonmarital property and shall divide the marital property in such proportions as the court deems just after considering all relevant factors including:**
 - (1) The economic circumstances of each spouse at the time the division of property is to become effective...;**
 - (2) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as a homemaker;**
 - (3) The value of the nonmarital property set apart to each spouse;**
 - (4) The conduct of the parties during the marriage; and**
 - (5) Custodial arrangements for minor children.**

§452.330.1 R.S.Mo.

Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the

sense of justice and indicate a lack of careful consideration. Medlock, supra at 189.

While there is no formula respecting the weight given to each of the aforementioned factors of §452.330.1, the trial court must divide the marital property based upon them so as to accommodate the needs of the parties. Id. at 190.

The first two factors to be considered under the statute are the economic circumstances of each spouse at the time of the division of property and the contribution of each to the acquisition of the marital property. § 452.330.1 R.S.Mo. (1996). In the present case, judgment was that neither party lacked sufficient property to provide for his/her reasonable needs nor was unable to support himself/herself through appropriate employment and the court heard no evidence regarding what contributions were made by each to the acquisition of the marital property. The third, fourth and fifth factor under § 452.330.1, however, do not justify the trial court's uneven division of marital property which was so heavily and unduly in favor of Appellant.

The third factor to be considered under § 452.330.1 relates to the value of the nonmarital property awarded to each party. It is the duty of the trial court to consider the separate, nonmarital property of each spouse in its division of marital property. Silcox v. Silcox, 6 S.W.3d 899 (Mo. banc 1999). The court in Silcox determined that a teacher's retirement fund may not be classified as marital property in a dissolution action and is not subject to dissolution. 6 S.W. 3d at 899. The Silcox case dealt with a teacher's retirement pension and its consideration in the division of property. Id. at 900. The court in that case awarded the wife the retirement pension as her separate property under § 169.572

R.S.Mo., which requires that a Missouri teacher's retirement account must be treated in the same manner as social security benefits. Id. at 902.

The Social Security Act, 42 U.S.C. §§ 201, provides: "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity..." Id. The court reversed the trial judgment and remanded for consideration of the pension benefits in the division of marital property, however, the division of property in Silcox prior to the consideration of the pension value was already heavily weighted in favor of the wife who held the pension. Id. at 904. Silcox requires "consideration" of the retirement plan in the equitable division of property, but does not elaborate on the extent and manner of such consideration. "No case has been cited or found that holds such consideration should extend to a dollar for dollar consideration in the division of the marital property." Smith v. Smith, 702 S.W.2d at 509 (Mo.App. 1985). The Western District held that Missouri case law "allows the trial court to consider a teacher's retirement fund as a relevant factor under § 452.330; however, when its inclusion in the property distribution causes a material impact on the division of property, its consideration is erroneous." DeMayo v. DeMayo, 9 S.W. 3d 736 (Mo.App. 2000). In DeMayo, the wife who held the pension plan was awarded approximately 13.45% of the marital property and the husband received approximately 86.55%. Id. at 741. This "material impact" has the effect of treating the fund itself as marital property when the division of marital assets is so skewed in favor of the party without the retirement fund. Id.

In the present case, Respondent/Cross-Appellant had a retirement plan through the public school retirement system following her employment with the Kansas City, Missouri School District with a value of \$193,693.00 at the time of dissolution. The plan was set aside by the trial court pursuant to Silcox as Respondent/Cross-Appellant's separate property. The trial court also used the value of the retirement plan in determining the division of the remaining marital property. The trial court divided the marital property and awarded to Appellant Dennis Woodson marital assets totaling \$359,274.00 in value. The court awarded to Respondent/Cross-Appellant Belinda Woodson marital assets totaling \$163,274.00 in value. Appellant Dennis Woodson was ordered to pay all of the marital debt which totaled \$140,392.00, and by subtracting the marital debt from his award, he received assets totaling \$218,882.00 against Respondent/Cross-Appellant's award of \$163,274.00, along with her retirement pension. This uneven distribution of the marital assets was not supported by the conduct of the parties in the record and appears to compensate Dennis Woodson for the dollar amount of Belinda Woodson's separate, nonmarital retirement pension. Moreover, the facts in the present case are distinguishable from those in Silcox, where the distribution of marital assets were heavily skewed in favor of the party with the pension plan. Belinda Woodson was given nearly forty-percent of the total marital assets without any justification presented to the trial court beyond the mere existence of her retirement plan.

The fourth factor to be considered in the division of marital assets under § 452.330.1 is the conduct of the parties during the marriage. This is frequently cited as the reason for an uneven distribution of assets. The types of conduct to be considered are

many and have included verbal and physical abuse, Divine v. Divine, 752 S.W.2d 76 (Mo.App. 1988); and the concealment of assets, In re Marriage of Clark, 801 S.W.2d 496 (Mo.App.1990). "Just division of property does not have to be equal, particularly where one party has engaged in misconduct." In re Marriage of Lewis, 808 S.W.2d 919 (Mo.App. 1991).

In the present case, Respondent/Cross Appellant endured emotionally painful verbal abuse while she was still living with Appellant which are more fully set out in the Statement of Facts. These incidents were often in the presence of the children and were in the form of profane and threatening tirades, threats of force and serious physical injury. These incidents required the filing of an Ex Parte Order of Protection by Respondent against Appellant and their separation in June, 2001. Respondent was not cross-examined by Appellant at trial and the court heard no testimony nor received any evidence of misconduct by Respondent. The misconduct of Appellant also extended to his concealment of assets which he admitted to on cross-examination. This misconduct by Appellant would have been sufficient basis under Missouri law to award Respondent/Cross-Appellant a greater percentage of the marital assets. Conversely, she received approximately twenty-percent less than Appellant which effectively treated her separate, nonmarital retirement fund as marital property notwithstanding Appellant's misconduct. This resulted in a material impact of the property distribution based solely upon Respondent/Cross-Appellant's retirement fund in a roughly sixty-percent to forty-percent distribution in favor of Appellant.

The last and fifth factor to be considered in the division of marital assets under § 452.330.1 is the custodial arrangements for the minor children. In Howerton v. Howerton, 796 S.W.2d 665 (Mo.App.1990) the Southern District adjusted the division of property on appeal by awarding the custodial parent an additional \$10,000.00 in marital property to protect the financial maintenance of the minor children. In the present case, Respondent/Cross-Appellant was ordered the primary residential custodian of all minor children. Again, this precedent would have served as a justification for awarding Respondent/Cross-Appellant a greater percentage of the marital assets under Howerton, however, the division favored Appellant who was not custodian of the minor children. This apparent disparity could only have been based on the Respondent/Cross-Appellant's retirement fund and also had the effect of materially impacting the marital property distribution in this case.

CONCLUSION

The trial Court abused its discretion in distributing the marital property upon dissolution in this case because the unequal division was against the weight of the evidence. The division heavily and unduly favored Appellant Dennis Woodson rather than Respondent/Cross Appellant Belinda Woodson in spite of numerous instances of misconduct by Appellant. The trial court's consideration and treatment of Belinda Woodson's teacher retirement plan had the effect of treating it as marital property in that there was no other justification for the approximately sixty-percent award in favor of Appellant to the approximately forty-percent awarded to Respondent. Moreover, there was sufficient evidence before the court to award Respondent a greater rather than lesser percentage of the marital property based upon the factors enumerated in §452.330.1 R.S.Mo., and in light of Appellant's admitted misconduct and Respondent's status as primary residential custodian of the minor children. Accordingly, the trial court's judgment should be reversed and the case remanded for an equitable division of marital assets.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE PURSUANT TO RULE 84.06

The undersigned hereby certifies that Respondent/Cross-Appellant's Brief in Case No. SC 84131 was signed and prepared pursuant to Rule 55.03; that the brief complies with the limitations contained in Rule 84.06(b); that there are 3,213 words, excluding the cover, this certification and the signature block, contained in Respondent/Cross-Appellant's Brief as counted by the word processing system used to prepare Respondent/Cross-Appellant's Brief; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus free; and that two true and correct copies of this brief, along with a floppy disk containing a copy of this brief, were hand delivered this 23rd day of May, 2002, to:

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